MICHIGAN APPELLATE ASSIGNED COUNSEL SYSTEM

THOMAS M. HARP
ADMINISTRATOR

July 30, 2010

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
Post Office Box 30052
Lansing, MI 48909

RE: ADM 2009-19: Proposed amendments of Rules 6.425, 6.502, 7.204 and 7.205 of the Michigan Court Rules

Dear Mr. Davis:

I write to strongly urge the Supreme Court to reject the proposed court rule amendments contained in ADM 2009-19. The current court rules covered by the proposed amendments are demonstrably workable and have been for a great many years. The current court rules provide an efficient, fair, balanced and just structure within which criminal defendants may seek post-conviction relief. The proposed amendments significantly reduce the number of indigent defendants who will be able to seek, or meaningfully seek, appellate or post-conviction relief. They also significantly reduce the time available to those who qualify for representation to seek that relief. The proposed amendments will further burden the already overburdened trial courts, require those courts, and the Court of Appeals, to develop an entirely new jurisprudence relative to "excusable neglect" and increase the cost to the State of incarcerated defendants serving invalid sentences.

MCR 6.425(G)(1)(b)

There is no need to eliminate the language proposed to be deleted: "The court should liberally grant an untimely request as long as the defendant may file an application for leave to appeal." This current language achieves a number of positive results without inordinately taxing the Court's resources. Indeed, the elimination of this language (along with the addition of the other proposed amendments to MCR 7.204 and 7.205) will cause more problems than it intends to solve.

As the Court is aware, the vast majority of criminal prosecutions are resolved by guilty plea, to which the proposed amendment to this section does not apply. Secondly, of those cases which are resolved at trial, a greater percentage of those convictions are appealed by right: either retained appellate counsel timely files a claim or, the claim is issued with the order of

appointment of appellate counsel, pursuant to the indigent's timely request. While certainly every year a number of indigent defendants fail to comply with the requirement to file a request for counsel within 42 days, the proposed language addresses numbers of appellate cases which are not demonstrably burdensome on the courts.

Those indigents accused of crime who proceed to trial do so for a variety of reasons. One of those reasons is, of course, that they are, or believe they are, legally or factually innocent. But it can also be the case that, though understanding their criminal culpability in some measure, they are unwilling or unable to admit to the culpability demanded by a plea bargain proffered by the government – no resolution short of trial is available. Should one of these defendants be found guilty and file a request for the appointment of counsel beyond "the prescribed period," it remains that this individual has almost certainly raised at trial issues of arguable merit for appellate review.

As the court stated in *People v Cottrell*, 201 Mich App 256, 259 (1993), and regarding the "liberally grant" language of the similar Court Rule:

> A more workable standard suggests that delay alone can never be a reason for denying the appointment of counsel in conjunction with a first appeal. Where lateness alone is the characteristic that qualifies for the exercise of judicial discretion, the denial of the request for no reason other than the delay constitutes an abuse of discretion [citation omitted]."

I recognize that the impact of the proposed amendments will eliminate the discretion specifically available pursuant to the "liberally grant" language. But, the historically valued policy considerations in support of allowing this smaller number of potential defendants to appeal (the vast majority of whom are indigent), pursuant to the "liberally grant" language, are met at very little cost to the appellate system.

Indigent Defendants and MCR 7.204(B) and MCR 7.205(B)

It is significant that the greatest impact of all of these proposed amendments will be felt by indigents. Indigent criminal defendants share a number of characteristics which make them significantly more likely to fail to meet the foreshortened timing deadlines for requesting counsel and the extended proposed filing deadlines for filing claims of appeal or applications for leave to appeal based on "excusable neglect." They are almost universally undereducated. A great many are functionally illiterate. Some are mentally ill. All have insufficient economic resources to hire counsel on appeal. Virtually none have any legal training. Even when not incarcerated, they have little or no timely-available access to legal texts and forms. That is, these characteristics make it more likely that indigents will miss the proposed timing deadlines for filing requests for counsel, for extensions, or motions for extensions, to file claims of appeal or applications for leave to appeal based on "excusable neglect." It is also important to consider that "excusable neglect" for failure to file a request for the appointment of counsel in either a claim or leave case within "the period prescribed"-proposed amendments to 7.204(B) and 7.205(B) (Alternatives A and B)-is not defined. Nor is it clear from Michigan jurisprudence what factual or legal circumstances will constitute "excusable neglect" for failing to request the

appointment of appellate counsel within 42 days [MCR 6.425G(b) and (c)], within 77 days [proposed MCR 6.425 (G)(3) and proposed MCR 7.204 (B)], within 42 days [proposed MCR 7.205 (B, Alternative A) or within 56 days [proposed MCR 7.205(B, Alternative B). It follows, then, that such questions will inevitably require judicial resolution over time, and at all levels of The One Court of Justice.

If an indigent defendant were to meet these new deadlines in either type of case, counsel will have to demonstrate, by motion, and where possible, the existence of "excusable neglect," in order to be able to proceed further on appeal. If an indigent defendant fails to meet these deadlines, the indigent defendant is required by the proposed amendments to file a motion to extend the time for filing either a claim or an application; without the benefit of counsel.

Whether represented or not, and given the characteristics of these litigants, questions about the existence of "excusable neglect" will not necessarily be easy to answer. Based on personal experience, some of these the questions regarding the existence of "excusable neglect" will include:

1. An incarcerated indigent defendant has no economic ability to create a prisoner account fund sufficient to insure an amount of available postage to mail to the trial courts the request for the appointment of appellate counsel prior to the expiration of the appellate deadline.

   Q: Is this "neglect"?
   Q: If so, is it "excusable neglect"?
   Q: What standard of proof must the defendant or the State meet to resolve these two questions?

2. An indigent defendant states that the request for the appointment of counsel was completely filled out and handed to a member of the trial court's staff, or of the security detail assigned to the court, immediately after sentencing. The staff person assured the defendant s/he would immediately file it with the court. It was not filed.

   Q: Is this "neglect"?
   Q: If so, is it "excusable neglect"?
   Q: What burden of going forward must the unrepresented defendant meet in the required motion?

3. An indigent defendant relies on the precise language of the "request for counsel form [which contains] an instruction informing the defendant that the form must be completed and returned to the court within 42 days after sentencing if the defendant wants the court to appoint a lawyer," MCR 6.425(F)(3). The defendant mails the properly filled-out and addressed form to the trial court on day 40. It is "filed by the court" (MCR 6.425(G)(1)(b)) on day 44.

   Q: Is this a timely filing?

Q. If not, does defendant's reliance on the "return" language of MCR 6.425(F)(3)-as being different from "filed" and the same as "mailed"-demonstrate "neglect"?
Q: If so, whose neglect? And is it "excusable"?

4. An appellate assigned counsel is appointed between days 43 and 77 [Proposed 7.204(B)] to represent a defendant who filed a late request for counsel after a trial-based conviction. Counsel's motion for extension of time to file a claim of appeal based on "excusable neglect" is denied.

Q. What type of appeal can be taken from this final order?
Q. Is current counsel obligated to file such an appeal?
Q. If not, what are the timing deadlines for the defendant to request new counsel?

These, and numerous other, questions regarding the existence of "excusable neglect" will have to be resolved if these proposed amendments are approved. And if the litigants involved have failed to meet the proposed deadlines for the appointment of counsel, they will be resolved on motion necessarily filed by unrepresented, under-educated, legally-unsophisticated, indigent defendants.

The Court should not act to create a necessity to develop jurisprudence, based on a slow, and judicial-resource-consuming process, of grave importance to the number of litigants who will inevitably need to rely on it, simply to resolve problems which only these proposed amendments would create.

MCR 7.205(B)

The proposed rule eliminates 7.205 (F). If adopted, all appeals by leave in criminal cases would have to be filed within 21 days, or within the periods allowed by the proposed amendments for extensions of time to file based on "excusable neglect": either within 42 days (Alternative A) or within 56 days (Alternative B). The elimination of (F) in conjunction with the imposition of these significantly reduced filing deadlines creates a tremendous hardship on indigent defendants and (if they are entitled to and obtain assigned counsel) their lawyers. It will also mean, for a number of reasons, that the already overburdened trial courts will be obligated to hear a great many new cases.

The proposed amendment to MCR 6.425(G)(3) does so only in so far as it references appeals by right: "In a case involving a conviction following a trial, if the defendant's request for a lawyer was not made within the time for filing a claim of appeal as provided in MCR 7.204(A) and (B) . . . ." MCR 7.205 does address the issue of any deadline for filing a request for the appointment of counsel to appeal a plea-based conviction. MCR 6.425(G)(1)(c) does, and would continue to do so; no amendment to it is proposed.

Every indigent defendant has the right to file a request for the appointment of counsel to appeal a plea-based conviction within 42 days. MAACS is not aware of any indigent defendant who requested and was appointed counsel on a plea-based conviction within sufficient time to file an

application for leave to appeal within 21 days. Further, every indigent defendant who files a request on this perfectly-acceptable 42nd day cannot, seemingly, have acted with "excusable neglect," or "neglect" at all. The indigent has merely relied on both the advice received in open court pursuant to MCR 6.425(F)(2), and on MCR 6.425(G)(1)(c).

It also appears that the proposed amendment stands for the proposition that an indigent defendant with the assistance of timely requested and appointed counsel who will be able to file a timely application for leave to appeal a plea-based conviction is one who received, essentially, ineffective assistance of trial counsel as it pertained to the guilty plea itself (MCR 6.310(C)) or through a failure to preserve a sentencing issue (MCR 6.429 (B)(3)).

It is only pursuant to MCR 6.310(C) and MCR 6.429 (B)(3) that counsel has an additional 6 months from sentencing to file motions to set aside a plea of guilty or to correct an invalid sentence. Given this reality, appellate assigned counsel must hope that, upon eventual receipt and review of the transcript, and after consultation with the defendant, unpreserved issues of arguable merit involving the plea, the sentence, or both, exist on the record. If so, trial court motions filed within this 6-month period which are decided and do not resolve the issues may be timely appealed by application for leave, MCR 7.205(A)(3).

Should this amendment be adopted, an increased and unnecessary burden will confront the trial courts. Under the proposed amendment to 7.205, it seems to be the case that appellate assigned counsel will be either required to return to the trial court in every appeal by leave or will be inclined to do so. Assuming that issues of arguable merit were addressed on the trial record but arguably incorrectly resolved, counsel will have to return to the trial court by way of a motion for relief from judgment. Counsel will be required, in order to create the opportunity for judicial review of, for example, a preserved invalid sentencing issue, to make a necessarily-very-similar argument to one previously made, to the same judge who already rejected the trial version of the argument. Thereafter, counsel may then appeal by leave from the denial of the motion for relief from judgment within 1 year, Proposed MCR 6.502. It seems abundantly clear that this requisite procedure will add to the burden of the trial courts.

Alternatively, appointed counsel will have the ability to review the plea and sentencing transcripts only long after the expiration of the proposed deadlines for filing an appeal by leave have expired. In order to preserve the right to file pursuant to MCR 6.310(C) and MCR 6.429 (B)(3), counsel may be inclined to file such motions before obtaining or reviewing the transcripts. Two different results of this inclination may follow.

Those client who did not receive representation at trial which preserved guilty plea and/or sentencing issues of arguable merit, as reflected in the record, would be in the "6-month from sentencing" position. Because the appropriate trial court motion is already filed, they will be able to file an application for leave to appeal. Those clients who are eventually revealed in the transcript to have already preserved the issues involving the plea or sentence have, nevertheless, extended the time within which to file an application for leave to appeal, as a result of the "pre-emptively" filed trial court motion. This class of clients is, oddly, better off than the class of defendants who received zealous trial advocacy. This is because these latter defendants are

required to re-raise an issue of perfectly certain arguable merit on leave to appeal a motion for relief from judgment and, in the process, give up their only right to ever file such a motion again.

Finally, I can also imagine the scenario where an appointed counsel might feel inclined to file a MCR 6.310(C) or MCR 6.429 (B)(3) even knowing that any argument as to the merits of such motions is very slight indeed.

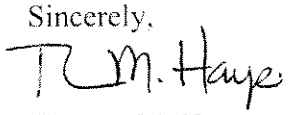
The burden of hearing and deciding all of these cases falls, by definition, on the trial courts. The necessity to create such a post-conviction system seems elusive at best.

There are also negative economic consequences which will flow from the proposed amendment. The amendment will inevitably deprive a great many indigent defendants or the ability to appeal plea-based convictions or to do so meaningfully. Despite the lengthy existence of the statutory guidelines, a significant number of cases involving sentencing guideline interpretation have continued to require appellate resolution. It costs the State of Michigan approximately $30, 000 per year to incarcerate an individual. Every appellate assigned counsel who successfully corrects an invalid sentence saves the State money it currently desperately needs and more than makes up for the cost of indigent representation. Placing procedural obstacles in the way of this economic benefit, while adding attendant costs for an increased trial-court workload, creates just such a negative economic consequence.

No wrongfully convicted and/or invalidly sentenced individual, indigent or not, should be deprived of or limited from appellate review. The proposed amendments will dramatically increase the likelihood that this will occur; and it will occur significantly more frequently if the individual is indigent. The proposed amendments add significant and unnecessary burden to the work of the trial courts. The proposed amendments will increase the costs of incarceration or supervision of convicted individuals. The Court should reject ADM 2009-19.

I appreciate the opportunity to comment on this Administrative File.

Sincerely,



Thomas M. Harp
Administrator